In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-806

ALBERT LOUIS KEEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is not yet reported. The opinion of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on November 27, 1974. The petition for a writ of certiorari was filed on December 26, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a recording of a telephone conversation in conformity with the Constitution and with federal law is inadmissible in a federal prosecution because of a violation of state law.

2. Whether the charges were properly joined.

3. Whether the judge properly selected the jury.

4. Whether the evidence was sufficient to convict on one of the counts.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on two counts of violating 18 U.S.C. 844(i), which punishes attempted or actual malicious damage or destruction, by use of an explosive device, of property used in interstate commerce or in an activity affecting interstate commerce. He was sentenced to concurrent terms of ten years' imprisonment on the first count and twenty years' imprisonment on the second. The court of appeals affirmed in a thorough opinion, on which we substantially rely (Pet. App. C).

Petitioner was convicted of planting dynamite aboard the fishing vessel "Hombre", which exploded and sank the boat, blew off both legs of the owner of the boat, Donald Johnson, and caused extensive injuries to his companion, Donald Wilson (Tr. 495-508). Petitioner was also convicted of having attempted this sabotage a few months earlier by paying a former employee, Roy Doiron, $700 to have the boat blown up.

1. On the night of December 6, 1972, the "Hombre" blew up and sank while tied at a dock on the Hoquiam River in Hoquiam, Washington. The boat was owned by Donald Johnson and used by him for part time fishing. Johnson had not been fishing regularly because the fishing was slow and the weather generally bad at that time of the year. Johnson's habit was to go out only if it was reported that a lot of fish were coming in (Tr. 619). On

December 5, when Johnson got home from work, his wife, Barbara Keen Johnson, ex-wife of the petitioner, told him that she had received a telephone call from petitioner in which he told her that his boat had been broken into the night before. Petitioner had said that the padlock on the boat had been sawed off and that someone had taken some fish and his groceries. He also informed her that another fisherman had caught five or six hundred pounds of fish recently in the area in which Johnson fished (Tr. 345-346).

The call from petitioner was regarded with suspicion by the Johnsons for several reasons. In September, 1972, Johnson had married Barbara after numerous threats and hostile confrontations with petitioner (*e.g.*, Tr. 334, 335, 515-517, 558, 610-612). In the ensuing months, petitioner called his former wife daily. However, those calls had abruptly terminated about two weeks prior to the call on December 5. It was unusual for petitioner to report a good catch of fish, but Johnson testified that, after hearing about the call, he decided he would go fishing the next night (Tr. 621-622). Petitioner called the Johnson home again on the afternoon of the 6th, and Barbara Johnson told him her husband intended to go out that night (Tr. 346).

When Johnson and his friend Wilson boarded the "Hombre" on the evening of December 6th, Johnson immediately noticed that the padlock had been sawed off, but he could not discern anything missing or otherwise awry (Tr. 623). As Johnson started the motor, the blast occurred. Experts testified that the explosion was probably caused by sticks of dynamite wired to the starter engine (Tr. 737-748). When Wilson was pulled onto the dock, he was yelling, "The lock was cut, the lock was cut" (Tr. 172). Immediately following the ex-

plosion, petitioner was observed at the top of the dock ramp. He asked one of the rescuers whom he was carrying. When told that it was Johnson, a look came over petitioner that puzzled the witness and that he described in these words: "he looked like he was glad that it happened" (Tr. 174-175). On the following day, photographs were taken at the accident scene, and again petitioner was seen (Tr. 53). Petitioner's friends testified that on December 7, he was visibly upset, unlike himself, drinking to unusual excess, and talked about committing suicide (Tr. 176-179).

2. The evidence further showed that petitioner had attempted previously to have the boat blown up. He had clarified his motives when he told Roy Doiron, the man with whom he was negotiating to do the sabotage, that "he didn't really care if it [the boat] got blown up or not, he just wanted the son of a bitch blown up that owned it" (Tr. 388). When the arrangement for having the job done by others collapsed,[1] petitioner sought Doiron's advice on how he could dynamite the boat himself. Doiron suggested the use of a remote control device so that petitioner could safely explode the dynamite from a distance of "from three to five miles away" and that petitioner call a hobby shop to find out about equipment (Tr. 403). The owner of a hobby shop some distance away received a call from someone about that time ("in the fall of the year") in the Hoquiam area inquiring about radio control equipment which was not to be used in model airplanes but for "other intentions." The caller would not disclose the use he contemplated (Tr. 465). Petitioner's telephone bill recorded a call to the Hobby Shop number on November 17, 1972 (Tr. 464).

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[1]Petitioner carried on correspondence and telephone calls with Doiron beginning in August 1972, in the course of which Doiron purported to have hired men to blow up the "Hombre". Doiron reported to petitioner that the $700 petitioner had paid him had been "ripped off" by the men. In fact, Doiron evidently had no intention of performing the job, but led petitioner on in order to obtain the money, which he needed (Tr. 367-400).

Petitioner's readiness to use explosives was demonstrated by testimony that he had discussed blowing up a non-union barbershop, as well as blowing up his boat for the insurance money, on occasions prior to the Johnson accident (Tr. 362, 365-366). Some years earlier, petitioner had actual experience in using dynamite. He also had told a friend at the time that he had a key to a building where loggers stored explosives (Tr. 532, 535-536).

During the course of the investigation, petitioner gave a statement to agents of the Bureau of Alcohol, Tobacco, and Firearms in which he denied harboring animosity or ill will toward Johnson for his relationship with Barbara, denied having argued with him or threatened him in any manner, and further denied having ever suggested the use of any type of explosives in a criminal manner at any time. Petitioner claimed that in October, 1972 he loaned the sum of $700 to an acquaintance who had since disappeared (Tr. 303-305).

On New Year's Day, petitioner told Doiron that he was suspected and asked him not "to blow the whistle," and, specifically, to deny having been paid $700 (Tr. 409-410). Subsequently, Doiron received a message that petitioner wanted him to call. Doiron made a collect call from an Olympia, Washington, police station to petitioner's barbershop, which was recorded by Special Agent Greear and played at trial. This conversation indicated petitioner's concern at being investigated. He instructed Doiron not to reveal the earlier $700 payment but, despite the latter's repeated prodding, claimed that he did not know who caused the blast on the "Hombre" (Tr. 420, 680; Supp to Tr.).

ARGUMENT

1. Petitioner claims that the recording of his telephone conversation with Doiron, made in accordance with 18 U.S.C. 2511(2)(c), should not have been admitted in evi-

dence because it was made in violation of the law of the State of Washington and because no *Miranda* warnings were given him at the start of the conversation.

In recording the telephone call that petitioner requested Doiron to make, Special Agent Greear acted properly under 18 U.S.C. 2511(c)(2).[2] Although under the laws of the State of Washington the recording of a conversation is illegal unless both parties to the conversation consent, it is settled that recordings obtained with the consent of only one party to a conversation do not violate the Fourth Amendment. *United States* v. *White*, 401 U.S. 745; *Holmes* v. *Burr*, 486 F.2d 55 (C.A. 9). The court of appeals correctly concluded that the admissibility of the evidence in this federal prosecution is governed by federal law (Pet. App. C, A-7):

> Where no constitutional right has been abused, the admissibility of evidence is governed by common law principles, not by local statute. *Wolfle* v. *United States*, 291 U.S. 7, 13 (1934); *Olmstead* v. *United States*, 277 U.S. 438, 469 (1928); *United States* v. *Woodall*, 438 F.2d 1317, 1327 (5th Cir. 1970), *cert. denied*, 403 U.S. 933 (1971). *See* Fed. R. Crim. P. 26. At common law, evidence was admissible regardless of its illegal origins. *United States* v. *Blue*, 384 U.S. 251, 255 (1966). Therefore, wiretap evidence obtained in viola-

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[2]Petitioner mistakenly cites 18 U.S.C. 2511(2)(d), which concerns recordings made by private parties (*i.e.*, persons not acting under color of law), as authority for the recorded conversations. However, since the recording was made by a government agent, it was authorized under 18 U.S.C. 2511(2)(c), which provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

> tion of neither the Constitution nor federal law is admissible in federal courts, even though obtained in violation of state law. *On Lee* v. *United States*, 343 U.S. 747, 754-755 (1952); *Olmstead* v. *United States*, 277 U.S. 438, 469 (1928); *United States* v. *American Radiator & Standard Sanitary Corp.*, 278 F. Supp. 241, 253 (W.D. Pa. 1967), *rev'd on other grounds*, 388 F.2d 201 (3d Cir.) *cert. denied*, 390 U.S. 922 (1968). *Cf. Zaroogian* v. *United States*, 367 F.2d 959 (1st Cir. 1966).

Furthermore, there is manifestly no requirement that the non-consenting party be given *Miranda* warnings, or that he be told that the conversation is being recorded. The need for warnings and other related protections arises only as to an accused in custody, which petitioner was not.

2. Petitioner's claim that the joinder of offenses was improper is likewise without merit. It is well settled that a ruling on a motion for a severance is within the sound discretion of the trial court and will not be disturbed unless there is a showing that there was an abuse of discretion. The joinder of the count relating to petitioner's attempt to destroy the "Hombre" in the same indictment with the count charging the successful destruction was proper under Rule 8(a), Fed. R. Crim. P. These offenses were part of a common scheme or plan. The court of appeals thus properly rejected petitioner's claim (Pet. App. C, A-8):

> The district court exercised its discretion soundly in refusing to order separate trials on the two counts of the indictment. Keen's destruction of the Hombre and his earlier attempts to employ others to do the deed were natural parts of a single narrative. *Bayless* v. *United States*, 381 F.2d 67, 72 (9th Cir. 1967).

Evidence produced at a trial on one count would be admissible at a trial on the other to show Keen's *identity*, motive, intent, and the existence of "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other . . . ." *Drew* v. *United States*, 331 F.2d 85, 90 (D.C. Cir. 1964). Under these circumstances, furthermore, the court did not abuse its discretion in refusing to instruct the jury that each charge and the evidence pertaining to it should be considered separately.

3. Petitioner's other contentions are baseless.

The trial judge is afforded wide latitude in establishing the procedure for selection of jurors. *Haslam* v. *United States*, 431 F.2d 362 (C.A. 9), certiorari denied, 402 U.S. 976. There is no showing by petitioner that his rights were prejudiced by the method used in this case.[3] As the court below found (Pet. App. C, A-9): "The record indicates a scrupulous attempt by the trial judge to be fair to Keen; we find no abuse of [the trial court's] discretion."

Finally, viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), there was sufficient evidence for the jury's finding that petitioner had caused the destruction of the "Hombre." Evidence of petitioner's phone call to the Johnson home on the day prior to the accident reporting successful fishing (which could be interpreted as made for the purpose of luring Johnson aboard the "Hombre"), and reporting the entry and theft aboard his own boat (which could be viewed as implying a current spate of vandalism, thus mitigating Johnson's suspicions when he found his own lock broken); petitioner's familiarity with and willing-

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[3]The jury was selected under the "Arizona system", *i.e.*, 12 prospective jurors were seated in the jury box and 15 were seated behind counsel during the *voir dire*.

ness to use explosives; petitioner's presence at the boat dock immediately following the blast, as well as the next day when the investigation was going on; the testimony of friends that he was extremely upset; his prior attempt to have others destroy the boat and Johnson; and the evidence of his extremely emotional attitude toward Johnson, provided ample basis for the jury to convict on the second count.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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